Supreme Court, U.S.
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No. 96-850

In The

Supreme Court of the United States

October Term, 1996

CITY OF ST. PETERSBURG, FLORIDA,

Petitioner,

vs.

WILLIAM A. BOWEN, as Trustee of the William A. Bowen Trust Agreement,

Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a municipal Nuisance Abatement Board order requiring complete closure of an apartment complex for one year, thereby depriving a property owner of all economic use of the property, requires compensation under the Florida and United States Constitutions.

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Respondent, William A. Bowen, as Trustee of the William A. Bowen Trust Agreement, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Florida's Second District Court of Appeals decision in *City of St. Petersburg v. William A. Bowen*, 675 So. 2d 626 (Fla. 2d D.C.A. 1996).

As noted by the Florida appellate court, this petition presents the narrow issue of whether closure of an apartment complex for one year, which undisputedly deprives an innocent property owner of all economic use of his property, amounts to a compensable taking by a municipality under Article X, Section 6(a) of the Florida Constitution and the Fifth Amendment of the United States Constitution.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT OF APPEAL MERELY APPLIES WELL-ESTABLISHED FIFTH AMENDMENT "TAKINGS" JURISPRUDENCE.

The Florida district court in *Bowen* conscientiously follows the precedents of this Court to reach its correct decision. Under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992), regulations which deny a property owner of substantially all productive use of his land constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. When a total regulatory taking occurs, the government can resist compensation only if the proscribed use merely prevents a common-law nuisance or does not restrict any part of the owner's inherent fee simple title. *Id.* In this case, because Petitioner's absolute closure decree deprived Respondent of an inherent title right to use his

apartment complex and Petitioner's decree was not a restriction only to prevent common law nuisances, the *Bowen* court correctly applies *Lucas* to determine that a compensable taking occurred — even if the taking was only for a limited period.

Ignoring the Florida court's proper application of this Court's "takings" jurisprudence, Petitioner argues that *Bennis v. Michigan*, 116 S. Ct. 994 (1996), supports the proposition that property "used" for an illegal purpose becomes a public nuisance and therefore may be confiscated by the government without payment of just compensation. In *Bennis*, the State of Michigan seized an automobile owned jointly by petitioner and her husband after the husband was convicted of gross indecency for sexual activities with a prostitute in the car. *Id.* at 996. This Court found that the automobile "facilitated and was used in criminal activity" and was therefore subject to Michigan's forfeiture statute. *Id.* at 1001. Additionally, because Michigan did not provide an "innocent-owner" defense, petitioner's lack of knowledge and consent to her husband's activities was irrelevant. *Id.* at 1000-1001.

Petitioner's reliance on *Bennis*, however, is misplaced. *Bennis* is a forfeiture case. There is no evidence that the state instituted forfeiture proceedings against Respondent or his property. Moreover, the due process concerns attendant in forfeiture cases are not addressed by section 893.138, Fla. Stat. (1995) or the St. Petersburg City Ordinance 1137-F (Code Sections 16-96 through 19-71), relating to Petitioner's Nuisance Abatement Board.

Under forfeiture law, the state confiscates property as a penalty because of the property's connection with the perpetration of a criminal act. In *Bennis*, the dissent identified three categories of property subject to seizure: "pure contraband; proceeds of criminal activity; and tools of the criminal's trade." *Id.* at 1004. The third category, sometimes referred to as

"derivative contraband," presents significant analytical problems when the "instrumentality" bears no connection with the crime other than as a mere location for its occurrence. *Id.* at 1004-1006. In fact, as observed by Justice Scalia, a building in which an isolated drug sale occurs cannot properly be regarding as an "instrumentality" of the offense for purposes of forfeiture because of the tenuous relationship between the confiscated property and the crime. *Austin v. United States*, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring in the judgment). As noted by the dissent in *Bennis*:

> While our historical cases establish the propriety of seizing a freighter when its entire cargo consists of smuggled goods, none of them would justify the confiscation of an ocean liner just because one of its passengers sinned while on board.

Id. at 1005 (citations omitted).

Contrary to Petitioner's invitation, this case does not present an opportunity for the Court to "reaffirm and strengthen" any principle of *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987). In *Keystone*, this Court upheld the constitutionality of state legislation designed to protect Pennsylvania's environment from problems associated with coal mine subsistence. The petitioners in *Keystone* claimed the legislation amounted to an unlawful taking because it required coal mining operations to leave various quantities of coal unmined, as a means of preventing subsistence in other areas. *Id.* at 475-79. Rejecting petitioners' argument, this Court noted that petitioners "retained the right to mine virtually all of the coal in their mineral estates . . . ." and therefore held that the statute therefore did not amount to a taking. *Id.* at 501. In other words, the petitioners in *Keystone*, unlike Mr. Bowen, did

not lose all economic use of their property. The governmental action in *Keystone* neither made it impossible for the claimants to engage profitably in their business nor involved undue interference with their investment backed expectations for their property. *Lucas, supra,* at 1021.

Petitioner selectively cites to a footnote in *Keystone* which addresses the unexceptional proposition that the Fifth Amendment does not require compensation when an owner's use of property is injurious to the public and the state takes limited steps to abate the injurious use. Petitioners' Brief at page 5, citing *Keystone, supra,* at 491-92, n. 22 (citations omitted). When reviewed carefully, the cases cited in the footnote can also be distinguished from respondent's case.

First, in every case cited in the footnote, it is the owner's use of property which is deemed a public nuisance and therefore proscribed. In contrast, Petitioner's Nuisance Abatement Board seeks to close Respondent's property purportedly to curtail alleged drug use by someone other than the innocent property owner. Unlike the cases cited by Petitioner there is no evidence that Respondent consented to or participated in the activity deemed a public nuisance.

Second, in none of the cases cited in the footnote is the owner deprived of all economic use of his property; each considers less than *Bowen*'s total regulatory taking.[1] *See Nassar v. Commonwealth*, 394 Mass. 767, 477 N.E. 2d 987 (1985) (temporary occupation of a portion of property to conduct clean-up procedures of an unlicensed hazardous waste operation not

1. Significantly, Petitioner does not and cannot maintain that the action of its administrative board deprives Petitioner of anything less than all economic use of his property for one year; rather, Petitioner contends only that such complete deprivation does not require compensation under the state and federal constitutions.

compensable); *Kuban v. McGinsey*, 96 Nev. 105, 605 P.2d 623 (1980) (statute regulating brothels did not deprive operators of all reasonable use of their property and therefore was not compensable as a taking under the Fifth Amendment); *MacLeod v. Takoma Park*, 257 Md. 477, 263 A.2d (1970) (city's razing of fire damaged building does not constitute a taking under the Fifth Amendment); *Eno v. Burlington*, 125 Vt. 8, 209 A.2d 499 (1965) (municipality's razing of dwelling deemed a fire hazard does not constitute a taking under the Fifth Amendment); *Pompano Horse Club, Inc. v. State ex rel. Bryan*, 93 Fla. 415, 111 So. 801 (1927) (property owner enjoined from using property as a race track for gambling operations not a taking under the Fifth Amendment); *People ex rel. Thrasher v. Smith*, 275 Ill. 256, 114 N.E. 2d 31 (1960) (property owner prohibited from using property as a "bawdyhouse" not a compensable taking).

II.

THE DISTRICT COURT OF APPEAL'S DECISION IS NARROWLY TAILORED, AND BASED UPON UNIQUE FACTS AND CIRCUMSTANCES, AND THUS DOES NOT AND CANNOT CREATE A "CONFLICT" WITH OTHER STATE COURT DECISIONS.

Finding Petitioner's specific order deprives Mr. Bowen of all economic use of his apartment complex, not merely specific property uses, the district court held that Petitioner's actions constituted a compensable taking under the fact specific circumstances. In doing so, it hardly "creates a conflict among state courts" or "discourage[s] all nuisance abatement boards in Florida from ordering a temporary closure of crackhouses, houses of prostitution, and dwellings used by street gangs." Indeed, the district court in *Bowen* acknowledges that government may abate common law nuisance, including illegal

conduct upon real properties. *Bowen, supra* at 629. Yet, as explained by the district court: "[T]he action of closing completely the apartments for one year was, in regard to Bowen's property rights, one of the most invasive methods of abating the purported nuisance that was available." *Id.* at 629. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, this Court recognizes that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas, supra* at 1017 (citations omitted). As such, according to *Lucas*, the property owner has suffered a taking compensable under the Fifth Amendment. *Id.*

As noted by Petitioner, numerous states have enacted nuisance abatement boards similar to those found in Florida. These boards attempt to provide for the public welfare by addressing the myriad of ills faced by our urban society and its citizens. The government, however, thorough a nuisance abatement board or otherwise, is prohibited by the Fifth Amendment of the United States Constitution from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan v. California Coastal Commission*, 483 U.S. 825, 835, n. 4 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The government may not take from the property owner, under the guise of regulation, core value of property, nor can it force a discrete minority or single individual to bear costs of public goods that should be born by the society as a whole. *Bowles v. United States*, 31 Fed. Cl. 37, 45 (1994). As the trial judge concluded in this case, if Petitioner wishes "to wage a war on drugs in part by means of this type of temporary taking then the city will be required to pay landowners just compensation." *Bowen, supra* at 632.

Petitioner cites a grab-bag of non-Florida state court opinions which ostensibly "conflict" with the opinion below.

As a preliminary matter, the alleged conflict of different state decisions, based on different facts and different state statutes, does not offer a basis for this Court's jurisdiction. Moreover, these decisions are factually inapposite to the case at hand, and thus do not provide support for Petitioner's argument. For instance, in *Minot v. Freelander*, 426 N.W. 2d 556 (N.D. 1988), the North Dakota Supreme Court upheld a lower court's decision declaring a private residence a public nuisance as a result of unsanitary conditions and building code violations. *Id.* at 559. To abate the nuisance, the house was demolished. *Id.* Of course, under these facts, the limited actions by the government did not amount to a taking compensable under the Fifth Amendment. *Id.* at 560; *see also Keystone*, *supra,* at 492 n. 22.

Similarly, in *Starzenski v. Elkhart*, 659 N.E. 2d 1132 (Ind. Ct. App. 1996), Indiana's highest court agreed that a homeowner's continued failure to remove garbage from private property warranted the city's limited action in entering the property and removing the debris. *Id.* at 1140-41. Such action, of course, did not constitute a "taking" under the Fifth Amendment. *Id.*

Minot and *Starzenski* merely hold the accumulation of trash on private property and the unsafe condition of buildings can constitute a common law nuisance and the government's limited action to abate such nuisances does not amount to a compensable taking, but instead is a simple exercise of the government's police power. *See, e.g., Mugler v. Kansas*, 123 U.S. 623 (1887). Furthermore, in neither case did the government deprive the property owner of *all* economic use of their property. As noted in the appellate court in *Bowen*:

> In the present case, there is no common law nuisance being prevented by the closure. The prohibited activity was any use of the

> apartment building. The NAB order did not really proscribe any particular nuisance, such as would be done by enjoining the sale or use of drugs on the premises. Such an injunction would leave other legal uses available to the Plaintiff, but the order involved here left *no* use available.

Bowen, *supra* at 631 (emphasis supplied in original).

Finally, Petitioner cites *Raynor v. Maryland Department of Health and Mental Hygiene*, 110 Md. App. 165, 676 A.2d 978 (1996), wherein Maryland's highest court confirmed that a pet ferret's demise at the hands of officials in order to test it for rabies, after it had bitten a child, did not amount to a compensable taking under the Fifth Amendment. *Id.* at 991. The court concluded that the "taking is not compensable if it is effected as a result of a regulation that does no more than proscribe or abate an activity for which a property owner is not entitled to use his or her property." *Id.* at 989. Since a biting ferret is a public nuisance endangering human health, and the animal must be destroyed prior to testing for rabies, the court concluded that no compensable taking occurred. *Id.* at 992.

Contrary to the unfortunate "taking" of the ferret's life in *Raynor*, however, the Petitioner's order did significantly more than proscribe or abate "an activity for which a property owner is not entitled to use his or her property." *Id.* at 989. Indeed, Mr. Bowen was using his property as a rental apartment complex. "There is no common law nuisance doctrine that prohibits the use of a building for rental purposes." *Bowen*, at 631.

Under Petitioners' analysis, because Mr. Bowen's multi-unit apartment complex also allegedly served as the sight of several illegal drug purchases, the apartment complex constituted a

public nuisance and could be shut down entirely.[2] Rather than merely abate the purported nuisance (*i.e.*, the purported sale of illicit narcotics), Petitioner's Nuisance Abatement Board prohibited all uses of Respondent's property. Under such circumstances, the Florida appellate court correctly applies state and federal constitutional principles in concluding that Petitioner's complete deprivation of use requires just compensation to Respondent.

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2. Petitioner's Brief suggests that the "illegal activities" (*i.e.*, sale of illicit narcotics) purportedly occurring on Respondent's property constituted a public nuisance in Florida as far back as the early 19th century. (Petitioner's Brief, pp. 6-7). Under Petitioner's argument, activities that "tend to annoy the community or injure the health of its citizens in general, or to corrupt the public morals" should be considered public nuisances today. Of course, under this logic, a host of activities would be subject to abatement, including bars, sporting events and public television. But Petitioner confuses the illegal activities of isolated tenants and others with the Respondent's perfectly legal "use" of his property as an apartment complex. Indeed, Petitioner's' Nuisance Abatement Board order proscribed not merely the "illegal activities" purportedly constituting a public nuisance, but all use of the property. Contrary to Petitioner's belief, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), does not countenance a "public nuisance" exception under these facts.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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